

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL SMITH, §
§
VS. § CIVIL ACTION NO.4:12-CV-730-Y
§
RICK THALER, §
Director, T.D.C.J. §
Correctional Institutions Div. §

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS
AND ORDER DENYING CERTIFICATE OF APPEALABILITY

In this action brought by petitioner Michael Smith under 28 U.S.C. § 2254, the Court has made an independent review of the following matters in the above-styled and numbered cause:

1. The pleadings and record;
2. The proposed findings, conclusions, and recommendation of the United States magistrate judge filed on December 31, 2012; and
3. The petitioner's written objections to the proposed findings, conclusions, and recommendation of the United States magistrate judge filed on January 7 and 16, 2013.¹

The Court, after **de novo** review, concludes that Petitioner's objections must be overruled, and that the petition for writ of habeas corpus should be dismissed with prejudice as time-barred under 28 U.S.C. § 2244, for the reasons stated in the magistrate judge's findings and conclusions.²

Therefore, the findings, conclusions, and recommendation of the magistrate judge are ADOPTED.

Petitioner Smith's motion to prevent fundamental miscarriage of justice (doc. 15) is DENIED.

¹On January 7, 2013, petitioner Smith filed a document entitled "Response to Director's Reply." He then filed, on January 16, 2013, his written objections. The Court has considered the reply to the response as additional written objections.

²Smith also filed a "Motion to Prevent Fundamental Miscarriage of Justice," which is DENIED by the application of the limitations provision.

Petitioner Michael Smith's petition for writ of habeas corpus is DISMISSED WITH PREJUDICE.

Certificate of Appealability

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.³ Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."⁴ The COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."⁵ A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."⁶

Upon review and consideration of the record in the above-referenced case as to whether petitioner Smith has made a showing that reasonable jurists would question this Court's rulings, the Court determines he has not and that a certificate of appealability should not issue for the reasons stated in the December 31, 2012 Findings, Conclusions, and Recommendation of the United States Magistrate Judge.⁷

³See Fed. R. App. P. 22(b).

⁴RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS, RULE 11(a) (December 1, 2009).

⁵28 U.S.C.A. § 2253(c)(2)(West 2006).

⁶*Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003)(citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

⁷See Fed. R. App. P. 22(b); see also 28 U.S.C.A. § 2253(c)(2)(West 2006).

Therefore, a certificate of appealability should not issue.
SIGNED January 22, 2013.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE